

Attorney I.D. 6290970

JPS/AAV

HG-83648

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

VIRGIL SMITH, Individually, &  
ADAM SMITH, through his legal guardian,  
VIRGIL SMITH,

Plaintiffs,

vs.

PHOENIX SEATING SYSTEMS, LLC  
d/b/a FALCON/LEBAC SYSTEMS, a  
limited liability corporation, and  
APRIA HEALTHCARE GROUP, INC.,  
a corporation,

Defendants.

and

PHOENIX SEATING SYSTEMS, LLC  
d/b/a FALCON/LEBAC SYSTEMS, a  
limited liability corporation,

Defendant/Third Party Plaintiff,

vs.

VELO ENTERPRISE CO., LTD.  
1012 Sec. 1 Chung Shan Road  
Tachia, Taichung Hsien, Taiwan  
P.O. Box 152 Tachia

Third Party Defendant,

and

RATTOX CORPORATION  
No. 19, Lane 3, Alley 227, Nung-An St.  
Taipei, Taiwan  
P.O. Box 68-367

Third Party Defendant.

Case No. 09-568-GPM

**THIRD PARTY DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS COUNT II and COUNT IV OF PHOENIX SEATING SYSTEMS, LLC'S THIRD PARTY COMPLAINT**

NOW COME the Third Party Defendants, VELO ENTERPRISE CO., LTD. ("VELO") and RATTOX CORPORATION ("RATTOX"), by and through their attorneys, SANCHEZ DANIELS & HOFFMAN LLP, and move this Honorable Court, pursuant to Federal Rule 12(b)(6), to dismiss Counts II and IV of the Third Party Complaint for failure to state a claim upon which relief can be granted; and in support of said motion, state as follows:

1. Plaintiffs Virgil Smith and Adam Smith filed a First Amended Complaint against Defendant/Third Party Plaintiff Phoenix Seating Systems, LLC ("Phoenix") alleging fault based upon strict liability.

2. Phoenix filed a Third Party Complaint against Velo Enterprise Co., Ltd. and Rattox Corporation.

3. Counts II and IV of the Third Party Complaint are based upon implied indemnity.

4. The Illinois Supreme Court in *Frazer* has dictated that a claim for indemnity must fail if the one seeking indemnity is at fault in the underlying action. *Frazer v. A.F. Munsterman, Inc.*, 123 Ill.2d 245, 261; 527 N.E.2d 1248, 1255 (Ill. 1988). *See also Dixon v. Chicago and N. W. Transp. Co.*, 151 Ill.2d 108, 121; 601 N.E.2d 704, 710 (Ill. 1992)("implied indemnity in a defective products case remains available only where the party seeking it was not negligent or otherwise at fault in causing the loss.")(internal citations omitted).

5. Importantly, there is no need for a judgment of fault to be entered prior to dismissing the implied indemnity counts. Instead, the party seeking implied indemnity need only be charged with fault in the underlying action. *See Thatcher v. Commonwealth Edison Co.*, 123 Ill.2d 275; 527 N.E.2d 1261 (Ill. 1988).

6. In the present case, Phoenix seeks indemnification from Velo and Rattox “in the full amount of any judgment rendered in favor of Plaintiffs and against Phoenix”. For Phoenix to be found liable to Plaintiffs a finding of fault on the part of Phoenix would have to be made.

7. Because the *Frazer* requirement of a faultless indemnitee is not met, Phoenix fails to state a cause of action for implied indemnity.

WHEREFORE, Third Party Defendants Velo Enterprise Co., Ltd. and Rattox Corporation respectfully request that this Honorable Court dismiss Counts II and IV of the Third Party Complaint and for such other relief deemed just and appropriate.

Respectfully submitted,

**SANCHEZ DANIELS & HOFFMAN LLP**

s/Joseph P. Sullivan

Attorneys for Third Party Defendants,  
VELO ENTERPRISE CO., LTD. and  
RATTOX CORPORATION

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**CERTIFICATE OF SERVICE**

To: **VIA ECF FILING**  
Attorneys of Record

I hereby certify that I electronically filed this Certificate of Service and Third Party Defendants' Rule 12(b)(6) Motion to Dismiss Count II and Count IV of Phoenix Seating Systems, LLC's Third Party Complaint on behalf of Third Party Defendants, VELO ENTERPRISE CO., LTD. and RATTOX CORPORATION via the ECF System and that a true and correct copy will be served electronically to all attorney(s) of record at or before 5:00 p.m. on September 7, 2010 and that this statement as set forth is true and correct.

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s/Joseph P. Sullivan

Joseph P. Sullivan (ARDC: 6206202)  
April A. Vesely (ARDC: 6290970)  
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